EX PARTE OR LATE FILED

RECEIVED

MAR 13 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900

FACSIMILE
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK

March 13, 1996

DOCKET FILE COPY ORIGINAL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20006

Re: Ex Parte Communication - CC Dkt. No. 95-185

Dear Mr. Caton:

I am submitting this ex parte letter on behalf of Bell Atlantic Corporation and Pacific Telesis Group in the above-captioned proceeding.[1] This letter replies to the ex parte memorandum filed by Cox Enterprises, Inc. ("Cox") on February 28, 1996, as well as to questions raised by various staff members in an ex parte meeting held on February 29, 1996.

Cox contends that the Telecommunications Act of 1996 ("1996 Act") and the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") "give the Commission exclusive authority to adopt its tentative proposal to establish an interim bill-and-keep mutual compensation policy for LEC-to-CMRS interconnection." Ex Parte Memorandum from Werner K. Hartenberger, Counsel for Cox Enterprises, Inc. to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 95-185 on February 28, 1996 ("Cox Memorandum") at 1. To reach this result, Cox constructs an elaborate statutory maze to lead the Commission out of the 1996 Act and back to the supposed freedom of the Budget Act.

But there is no way out of the 1996 Act short of running roughshod over Congress's new Section 251/252 regime, which leaves local interconnection arrangements to be negotiated and determined by agreement, subject (where necessary) to arbitration by the states. And, even if the Commission found a way out, the

---

[1] Pursuant to Section 1.1206(a)(1) of the Commission's rules, 47 C.F.R. § 1.206(a)(1), the original and two copies of this ex parte letter have been filed contemporaneously with the FCC's Secretary's office.

No. of Copies rec'd 0+4
List ABCDE

Budget Act itself provides no authority to mandate the terms and conditions of CMRS interconnection. Indeed, the Commission would have to ignore the language of the Budget Act and overrule no fewer than three of its prior decisions to conclude otherwise.

If the Commission follows Cox's lead, it will, in its very first interconnection rulemaking, be usurping a power withheld from it and trampling upon the negotiation and arbitration provisions carefully fashioned by Congress. That would be an unfortunate start under the new Act.

I. Sections 251 and 252 Do Not Permit the FCC to Dictate the Terms of Interconnection Beyond the General Mandates Contained in those Provisions.

Cox states that "Section 251 of the [1996 Act] governs LEC provision of interconnection to telecommunications carriers" and that "CMRS providers generally fit the definition of 'telecommunications carrier'." Cox Memorandum at 5. Cox nevertheless argues that the Commission can escape Section 251 via subsection 251(i), which provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 [of the Communications Act]." See id. at 6. We deal with that mistaken assertion below. But it is still an admission that the right place to start the analysis is with Section 251. Other companies that urge the Commission to adopt a bill-and-keep regime for LEC-CMRS interconnection even more frankly acknowledge that the issue is now governed by Section 251, and the procedures for implementing it found in Section 252.[2]

Sections 251 and 252 of the 1996 Act create a "new model for interconnection." Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 121 (1996). The hallmark of the new regime is that interconnection arrangements between carriers are to be negotiated and determined by agreement, subject (where necessary) to arbitration by the

---

[2] See, e.g., Comments of the Allied Personal Communications Industry Association of California at 12 (Feb. 29, 1996); Comments of the Westlink Company at 20-21 (Feb. 29, 1996); Comments of Paging Network, Inc. at 37 (Mar. 4, 1996) ("Paging Network Comments"); Comments of New Par at 23 (Mar. 4, 1996); Comments of GO Communications Corporation at 12 (Mar. 4, 1996); Comments of the Telecommunications Resellers Association at 11 (Mar. 4, 1996); Comments of Century Cellunet, Inc. at 10 (Mar. 4, 1996).

states. The Commission's role is largely limited to interpreting the parameters of the Act and resolving specific disputes where the states fail to do so within the time frames prescribed by the Act. The Commission can adopt general guidelines pursuant to the Act's requirements, but it may not impose additional prescriptions.

Section 251 itself establishes the basic interconnection requirements. There are some specific rulemaking tasks with which the Commission is charged. For example, the Commission must issue requirements for number portability, § 251(b)(2) and take over (directly or indirectly) the administration of telecommunications numbers, § 251(e)(1). Beyond such specific charges, however, the Commission's job is simply to "implement the requirements of [Section 251]," § 251(d)(1), not to add to or alter those requirements.

In some cases, even the requirements of Section 251 itself must give way to private negotiations. For example, Section 252(a)(1) allows parties, through voluntary negotiations, to reach interconnection agreements "without regard to the standards set forth in subsections (b) and (c) of section 251."[3] Thus, the Commission cannot even mandate that all interconnection agreements comply with those standards, much less mandate more detailed requirements of its own.

The states are specifically given authority to impose additional access and interconnection obligations on LECs, as long as those requirements are consistent with, and do not substantially prevent implementation of, the requirements of Section 251. § 251(d)(3). But the Commission itself is given no such authority and is, in fact, expressly forbidden from precluding such state regulations. Id.

The Commission must set up procedures in the event that a state fails to comply with the requirements of Section 252. See § 252(e)(5). Thus, the Commission must establish procedures for: (1) reviewing complaints and making its own determinations regarding state commission action or inaction; (2) issuing orders

---

[3]Similarly, Section 252(e)(2) provides different standards for state review of interconnection agreements, depending upon whether the agreement is the result of voluntary negotiation or arbitration. Only if it is the latter, does the state determine that it complies with Section 251. In the former instance, the agreement simply has to be non-discriminatory and consistent with the public interest.

"preempting the State commission's jurisdiction" when necessary; and (3) implementing the state's responsibilities under Section 252(e).[4]

The Commission's job, therefore, is essentially one of amplification and policing. The Commission may clarify the parameters within which the negotiation/arbitration process of Section 252 is to occur. And the Commission should be available to hear complaints that individual states have not complied with those requirements in passing their own interconnection requirements and/or passing upon or arbitrating interconnection agreements. Beyond that, the Commission has no appropriate role.

II. Under Sections 251 and 252, No Regulator May Mandate Bill-and-Keep.

Within the Section 251/252 regime, it is clear that the Commission cannot mandate bill-and-keep. Indeed, no regulator can do so because it is inconsistent with the Act's requirement that, absent voluntary agreements to the contrary, there be a recovery of costs. No one seriously disputes this point. Cox's ex parte Memorandum does not deal with it at all. And Cox's Comments merely assert, completely implausibly and without explanation, that "the pricing standards contained in Section 252 provide reasonable support, by analogy, for the Commission's bill and keep CMRS decision." Comments of Cox Enterprises, Inc. at 44-45 (Mar. 4, 1996) ("Cox Comments"). In fact, the pricing standards contained in Section 252 flatly preclude a mandated bill-and-keep regime.

The requirement that LECs interconnect with CMRS providers could only be found in Section 251(b)(5) or Section 251(c)(2). The first requires LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The second requires incumbent LECs to provide

---

[4]Section 252(e)(4) suggests that the failure of a state to act to approve or reject an agreement adopted by negotiation or arbitration within the specified time frame does not constitute failure to act for purposes of Section 252(e)(5). Rather, it results in the agreement being "deemed approved," § 252(e)(4), and thus appealable directly to Federal district court. § 252(e)(6). Consequently, the Commission can expect its reviewing role to be necessary only when a state blatantly rejects a request to arbitrate open interconnection issues under Section 252(b)(1), or passes access regulations that conflict with, and substantially impede implementation of Section 251.

interconnection with their networks at any technically feasible point "for the transmission and routing of telephone exchange service and exchange access."

If interconnection is under Section 251(b)(5), then the pricing standards of Section 252(d)(2) come into play.[5] These require "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of calls that originate on the other's network, determined on the basis "of a reasonable approximation of the additional cost of terminating such calls." In other words, there must be a recovery of costs.[6] Yet, the Commission's proposed bill-and-keep arrangement permits no cost recovery. Although the parties may voluntarily agree to "waive mutual recovery," § 252(d)(2)(B)(i), regulators have no authority to mandate such an arrangement.

If interconnection is under Section 251(c)(2), then the pricing standards of Section 252(d)(1) come into play.[7] These require rates "based on the cost . . . of providing the interconnection . . . and may include a reasonable profit." Again, at a minimum, the regulator must permit costs to be recouped. A bill-and-keep regime flies in the face of this statutory requirement.

III. Section 251(i) Does Not Provide a Backdoor Out of the Section 251/252 Regime for LEC-CMRS Interconnection.

Instead of taking on the point that Section 252 precludes any regulator from mandating a bill-and-keep arrangement or the even the broader point that Sections 251 and 252 sharply limit the Commission's ability to mandate any of the terms and conditions of interconnection, Cox constructs an intricate argument to

---

[5]Section 252(d)(2)(A) notes that its terms are "[f]or the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5)."

[6]CTIA suggests that bill-and-keep pricing "can be thought of as another form of mutual compensation, where the compensation rate is set at $0.00." Comments of the Cellular Telecommunications Industry Ass'n at 7 n.10 (Mar. 4, 1996) ("CTIA Comments"). But when the costs are not $0.00 and the balance of traffic is not the same, the compensation rate cannot be set at $0.00.

[7]Section 252(d)(1) states that its provisions are "for purposes of subsection (c)(2) of section 251."

try to slip the Commission out the back door of the 251/252 regime, and into the supposed freedom of old Sections 201/332.

Cox's argument, stripped of all the rhetoric, boils down to this: Section 251(i) preserves the Commission's authority under Section 201. Section 201(a) allows the Commission to mandate interconnection for interstate services and Section 201(b) gives the Commission authority to determine reasonable charges for such interstate interconnection. Section 332(c) makes all CMRS interconnection issues interstate. This matter, Cox concludes, can therefore be handled exclusively under Section 201 and without regard to Sections 251 and 252. See Cox Comments at 39 n.77. See also Paging Network Comments at 37-38; CTIA Comments at 62.

This argument suffers from two basic flaws. First, Section 251(i) is not a trojan horse that completely undermines the 251/252 regime for interconnection agreements that have an interstate component. Even if CMRS interconnection were to be considered an interstate matter, it would still have to be handled within the 251/252 framework.

Second, and in any event, the Budget Act did not "federalize" CMRS interconnection. The Commission would have to overrule no less than three of its prior recent decisions to reach such a result. See III(B), infra. If the Commission did so, it would appear that the Commission is turning somersaults, simply to avoid implementing the interconnection regime established by Congress.

A. Section 251(i) Does Not Permit the Commission to Ignore Sections 251 and 252 for the Interstate Aspects of Local Interconnection Agreements.

Section 251(i) provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." Cox argues that this general provision enables the Commission to ignore completely Sections 251 and 252 whenever interstate services are in question. See Cox Comments at 44 (because Commission can act "under its general Section 201 powers, Section 252 has no particular relevance for any interconnection policy established by this proceeding"). This argument proves too much.

Congress has spoken in Sections 251/252 on how it wants all local interconnection agreements to be handled, and Congress did not distinguish between the interstate and intrastate aspects of

interconnection agreements in Sections 251/252.[8] All interconnection agreements for the provision of competing local exchange and exchange access services are to be dealt with under this scheme. Thus, for example, Section 251(d)(3)'s grant of authority to the states is not limited to specifically intrastate elements of interconnection; it covers all local "access and interconnection obligations of local exchange carriers." This is in keeping with existing Section 221(b)'s reservation of state jurisdiction over all "telephone exchange service[s] . . . even though a portion of such exchange service constitute interstate or foreign communication." 47 U.S.C. § 221(b).

Section 251(i), like the other "savings" clauses in the Act, is a generic provision. See § 601(b) (savings provision for antitrust laws); § 601(c)(2) (savings provision for state tax laws). It is not a specific exemption from the requirements of Sections 251/252 for services with an interstate component. Section 251(i) merely "saves" the authority in Section 201; it does not destroy Sections 251/252 and the careful regime Congress established for dealing with local interconnection agreements.[9]

Indeed, even if Section 251(i) could be read to preserve the Commission's authority to pass relatively detailed regulations, pursuant to Section 251(d)(1), governing some interstate aspects of interconnection agreements, it would still not take such

---

[8]For this reason, Omnipoint's concern that it would be "unworkable" to split regulatory jurisdiction over the intrastate and interstate portions of CMRS interconnection is misplaced. Comments of Omnipoint Corporation at 14 n.9 (Mar. 4, 1996) ("Omnipoint Comments"). See also Cox Comments at 40. The Act provides a single framework for dealing with both aspects of local interconnection agreements. It would not, therefore, matter if it were sometimes "impossible to ascertain the jurisdictional nature of [CMRS] services," New Par Comments at 25. Sections 251 and 252 provide a single mechanism for dealing with both.

[9]In our view, access agreements for the origination and termination of toll calls are not covered by Sections 251 and 252. That is a separate question, however, that the Commission need not resolve here. Interconnection agreements that allow a competing carrier, such as a CMRS provider, to provide "for the transmission of exchange service and exchange access," § 251(c)(2)(A), clearly are covered by Sections 251 and 252. And that is enough to preclude the Commission from mandating a bill-and-keep regime.

agreements altogether outside the scheme of Section 251. Any regulations passed by the Commission would still have to be consistent with Section 251, as well as with the pricing rules of Section 252(d). And the agreements themselves must still be negotiated and approved pursuant to Section 252.

Thus, although the FCC retains its general Section 201 authority, it cannot exercise that general authority in a way that is contrary to the more specific mandates of Congress in Sections 251/252. The authority is at most interstitial and, where Congress has spoken directly on a particular matter (as it has on pricing), the authority is not to be exercised at all. See Ohio Power Co. v. FERC, 954 F.2d 779, 784-85 (D.C. Cir. 1992) (specific provisions trump general ones).

B. Congress Did Not "Federalize" CMRS Interconnection.

Cox claims that the Budget Act declared CMRS "an interstate service and, therefore, jurisdiction over the rates, including the rates for interconnection to this interstate service, were federalized." See Cox Memorandum at 4. For the reasons given above, that would still not take CMRS interconnection outside the 251/252 framework. But, in any event, the claim is triply wrong.

The Budget Act did not "federalize" CMRS at all. To the contrary, Congress made a decision to deregulate local CMRS rates, not to regulate them federally. See Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1480 (1994)("CMRS Second Report and Order") ("revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates"). The reason Congress had to specifically preempt state authority over CMRS rates is precisely because those rates are intrastate. But Congress did not thereby make CMRS an interstate service. To find otherwise now, the Commission would have to overrule itself on this point.

But even that would not be enough to help Cox's argument. The Commission has also concluded that Section 332(c)(3)(A) only covers the rates charged by CMRS providers to subscribers, not LEC-CMRS interconnection agreements. See Report and Order, Petition on Behalf of the Louisiana Public Service Comm'n for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana, 10 FCC Rcd 7898, 7908 (1995) (Section 332(c)(3)(A) does not deprive states of jurisdiction over interconnection compensation agreements). Thus, far from "federalizing" such agreements, Section 332 does

not even deprive the states of jurisdiction over them.[10] The Commission would have to overrule itself on this point as well to follow Cox.

But that would still not be enough. Cox's argument depends on the further point that the interstate and intrastate aspects of CMRS interconnection are inseverable. That is the excuse for complete federal regulation on the subject. But as Cox itself acknowledges (Comments at 36-37), the Commission has always distinguished between mandating a federal right to physical interconnection to protect interstate services and permitting the states to regulate intrastate interconnection rates. See Declaratory Ruling, The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910, 2912 (1987). The two matters are separable and nothing on this score was changed by the 1993 Budget Act. That is a third

---

[10]Omnipoint argues that "[b]ecause LEC interconnection rates would have to be recovered by the CMRS operator through the rates to its subscribers, there is little sense in distinguishing interconnection rates charged to a CMRS operator from rates charged by a CMRS operator; states are preempted from regulating either one." Omnipoint Comments at 13-14. But this argument proves too much. Every supplier of goods and services to a CMRS provider would be caught up in it. Simply because a retailer passes on to its customers the costs it must pay to suppliers does not mean that those costs cannot be distinguished and regulated separately from the rates charged to customers. One might as well say that Congress "federalized" the rates charged by equipment manufacturers to CMRS providers.

Other commenters argue that Section 253(e), which provides that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers," demonstrates the Commission's exclusive jurisdiction over CMRS. See, e.g., Paging Network Comments at 29; Cox Memorandum at 8. But Section 253(e) -- which is part of a section on removal of barriers to entry -- merely confirms that the preemption of state authority over the rates charged by CMRS providers to their subscribers is still intact. It does not broaden the reach of Section 332(c)(3) to cover LEC-CMRS interconnection agreements. CTIA wrongly suggests that "to apply Sections 251 and 252 to the LEC-CMRS relationship in place of Section 332, the Commission would effectively strip Section 332 of any meaning." Comments at 59-60. Section 332 still plays a vital role in putting the rates charged by CMRS providers to their subscribers beyond the reach of state regulation.

point on which the Commission would have to overrule itself. See CMRS Second Report and Order, 9 FCC Rcd at 1430 (interstate and intrastate aspects of interconnection can be severed for regulatory pricing purposes).

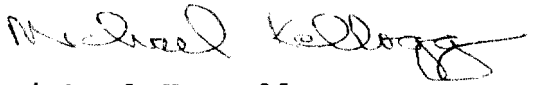
The Commission could try to overrule itself on all three of these points. But after all such turnabouts, it would still be led back through the statutory maze constructed by Cox to the requirements of Sections 251 and 252.

> We shall not cease from exploration
> And the end of all our exploring
> Will be to arrive where we started
> And know the place for the first time.[11]

IV. If the Commission Did Have Authority to Mandate Bill-and-Keep, It Should Decline to Exercise That Authority.

Finally, even if the Commission were somehow to conclude that it has the authority to regulate LEC-CMRS interconnection outside the Section 251/252 regime, it should not use that authority to mandate bill-and-keep. Bill-and-keep is patently inconsistent with the Congressional desire for reciprocal recovery of interconnection costs embodied in the 1996 Act. See § 251(b)(5); § 252(d)(2). As noted in Section II of this letter, bill-and-keep provides no recovery of interconnection costs. But Congress envisioned this result only where the parties voluntarily agree to "waive mutual recovery," § 252(d)(2)(B)(i). Despite the plain language of the statute and the clear indication of Congressional intent, Cox has asked the Commission to conclude that it has back-door authority to mandate bill-and-keep. Even if the Commission decides as a technical matter that it has such authority, it should decline to exercise it in deference to Congress's intent to establish a scheme of mutual recovery.

Respectfully submitted,



Michael K. Kellogg
Counsel for Bell Atlantic Corporation and Pacific Telesis Group

cc: Karen Brinkmann

---

[11]T.S. Eliot, Four Quartets, IV, lines 239-243.